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ALEXANDER L. STEVAS,
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No. 80-1991

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF OREGON,

Petitioner,

v.

BRUCE ALAN KENNEDY,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 4, 1981
CERTIORARI GRANTED OCTOBER 13, 1981

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The following opinions and orders have been omitted in printing this appendix, because they appear on the following pages of the printed petition for certiorari:

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Dec. 7, 1979—Indictment filed in Circuit Court for Multnomah County, Oregon, accusing Kennedy of theft in the first degree.

Dec. 26, 1979—Kennedy arraigned on indictment and entered plea of not guilty.

Feb. 27, 1980—Kennedy's first trial began.

Feb. 28, 1980—Circuit court orally declared mistrial on Kennedy's motion.

Mar. 5, 1980—Formal order declaring mistrial filed.

Mar. 17, 1980—Circuit court heard and orally denied Kennedy's motion to dismiss on ground of former jeopardy; retrial began.

Mar. 19, 1980—Verdict of guilty returned.

Mar. 19, 1980—Kennedy's previously-denied motion to dismiss on ground of former jeopardy filed.

Apr. 24, 1980—Judgment entered, suspending imposition of sentence, placing Kennedy on probation for three years, and imposing court costs in the amount of $878.00.

May 22, 1980—Kennedy's notice of appeal filed.

Nov. 24, 1980—Opinion of Oregon Court of Appeals entered, reversing circuit court.

Dec. 24, 1980—State's petition for reconsideration or review filed.

Jan. 9, 1981—Order of court of appeals entered, denying reconsideration.

Mar. 4, 1981—Order of Oregon Supreme Court entered, denying review.

Mar. 16, 1981—Judgment and mandate of court of appeals issued.

May 4, 1981—State's petition for certiorari filed.

Oct. 13. 1981—Certiorari granted.

INDICTMENT

[Filed December 7, 1979]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR MULTNOMAH COUNTY

THE STATE OF OREGON, Plaintiff.	)	• C79-12-34399 • DA 168843-7904 SECRET • PPB 79-19624
vs.	)	
BRUCE A. KENNEDY, Defendant.	)	INDICTMENT FOR VIOLATION OF ORS 164.055

The above-named defendant is accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of the crime of THEFT IN THE FIRST DEGREE committed as follows:

The said defendant, between July 21, 1978 and March 30, 1979, in the County of Multnomah, State of Oregon, did unlawfully and knowingly commit theft of one (1) red Kashan persian rug, of the total value of more than Two Hundred Dollars, the property of Benjamin Aryeh, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon.

Dated December 6, 1979, at the City of Portland, in the County aforesaid.

[Signatures, indorsements, and names of witnesses examined before Grand Jury omitted in printing]

TRANSCRIPT OF FIRST TRIAL
(excerpts)

[Caption omitted in printing]

[February 27, 1980]

* * * * *

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OTTO EWALDSEN, called as a witness in behalf of the plaintiff, having been duly sworn by the Clerk, was examined and testified as follows:

THE CLERK: Be seated, please. Please state your full name and spell your last name for the Court.

THE WITNESS: My name is Otto Ewaldsen and the last name is spelled E-W-A-L-D-S-E-N.

DIRECT EXAMINATION

BY MS. JOHNSON:

Q Mr. Ewaldsen, would you tell the Court how you're employed?

A I own my own oriental rug gallery.

Q Where is that?

A In Medford, Oregon.

Q What is the name of your gallery?

A Ewaldsen Gallery and Oriental Rugs.

Q Can you tell us, if you will, how long you have been in the business of oriental rugs in general?

A I have been involved in the oriental rug business for about 16 years.

Q And during that time what have you done with respect to oriental rugs?

A Well, I've been involved with all phases of the oriental rug business. I've been — of course, I buy and sell rugs.

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I do a great many appraisals. I deal in the rare rug market. I've studied in most of the museums of the world, the important rug collections there, in England, Austria, Germany. I'm considered to be sort of an unusual rug dealer and also I'm considered to be a scholar —

MR. ELLIOTT: I'll object. That call [*sic*] for a conclusion of this witness, or states a conclusion.

THE COURT: All right. Just your training rather than your conclusions —

Q (By Ms. Johnson) Mr. Ewaldsen, would you —

THE COURT: — your experience.

Q (By Ms. Johnson) Would you detail for the Court and the jury the collections you have studied in the following museums: Do you have a copy of your resume with you?

A Well, I can, I think, pretty well tell you. I've studied in Victorian [*sic*] — first of all, a study collection is something different than what you would see if you just visited a museum as a visitor. The study collection is in the back room, you might say, or the special room set aside for study, so that people will have the opportunity to learn and can feel the rugs first-hand, because obviously you can't because if you

found one hanging on the wall, it would be difficult for you to study it. To study the fabric of a rug is very important and so are the knots, the way they're tied, the materials that are used, the dyes that are used,

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and all this, and you have to be able to examine them beforehand, so this is why most of the museums that have rug collections have a study facility available for you.

I've studied in the Victorian [*sic*] Museum in London, the _____ Museum in Cambridge and the Oxford Museum in Oxford, the Museum of Applied Arts in Vienna. In 1978, I spent time in both East and West Berlin in the museums there. As I say, I have studied in many of them throughout the country. I have also attended symposiums. I have attended both the world conferences which are conferences — the first was in '76 in London, the second was in '78 in Munich, and these are conferences put together for scholars. They're not for dealers. They're for students of rugs or if you're an interested person, you could go: connoisseur, collector, that type of thing. The world experts are there to conduct the symposiums and, in other words, to act as teachers. I wasn't a teacher. I was a student and a learner and have done this, as I say, as much as a hobby and an avocation, as well as a vocation.

I have done thousands of appraisals of [*sic*] a very detailed appraisal form that we use which I could show you, it's in my briefcase, which I devised myself, and it is used by rug appraisers throughout —

MR. ELLIOTT: I'll object to that as hearsay.

MS. JOHNSON: Hearsay!

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THE COURT: All right. Sustained as to that part.

Q (By Ms. Johnson) Mr. Ewaldsen, do you also own or collect any books on Persian rugs or oriental rugs?

A Yes. I probably have one of the largest private collections of oriental rug books in the United States. I have well over 200 volumes and countless articles which I have never inventoried, but these books go back from the early days of — well, the first book written on oriental rugs was 1880. I have most of the old ones. There are a few I'm still looking for and I have most all the new ones.

Q Have you done any teaching yourself in this area?

A Yes. I have conducted numerous classes. Well, we had a public education course connected with the Medford school district. We have also done many lectures, lectured many, many times to all sorts of service clubs and other organizations. I have — since I have studied in the conservatory laboratories both in England and in Germany, in our own store or gallery, I

have a restoration department and I have taught the women that work there myself and they have learned from me what I have learned in these other laboratories.

MS. JOHNSON: Your Honor, will the Court accept this man as a qualified witness in this area?

THE COURT: All right. You may proceed.

MS. JOHNSON: Thank you.

Q (By Ms. Johnson) Mr. Ewaldsen, I'd like to show you

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what's been marked State's Exhibit 2.

(Counsel approached the witness.)

(The exhibit was handed to the witness.)

Also, I would point out to you for your attention the rug in front of us, marked State's Exhibit 3. Pursuant to my request, have you compared the rug in the photograph, Exhibit 2, with this rug?

A Yes, I have, if that's the rug that was in the jury room earlier.

Q Okay. If you want, would you like to get down and look at it?

A I will, just to be sure.

(The witness stepped down to the easel which was located in front of the jury panel.)

This is the rug.

Q This is the rug that you examined?

A Yes.

Q Will you tell us, first of all, what kind of rug this is?

A This is a Kashan. It's made in Iran. When that rug was made, it was known as a Persian.

Q What does "Kashan" mean?

A The word "Kashan" comes from the community or the village Kashan. Most Iranian rugs bear the name of the village in which they were made or the neighborhood in which they were

made, except for tribal rugs and they're named after the tribes they come from.

Q Does this village produce a particular pattern or design for each rug or is that a general thing?

A Generally, they produce a very similar design. They also — the more important thing is the weave. The weave in each rug is quite distinctive and can — especially in Persian rugs, one can pretty well identify the — both the community or even the village or tribe that made the rug from the weave.

Q Can you tell us how this rug was made?

A This rug was made on a vertical loom and there are two types of looms. One is horizontal, and this is the type used by nomads and people out in, you might say, the countryside. Most of the village rugs are made on vertical looms which stand upright and the warp strands are strung vertically and then they commence to tie the knots. The knots on this rug are tied, one

knot encompasses two warp strands. This rug is tied with one knot, a Senna knot, but anyway it's — a Persian knot is contrary to a Turkish knot, but it's tied with a Persian knot. Each knot is tied and they're tied all the way across the rug and wet threads woven through the warps, and then they're packed down and the next row is placed and so the rug is built up. It takes a long time to make a rug this complicated and as fine a design as it is.

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Q Can you tell us of what material this is made?

A This rug would be made with cotton warp and wool is pile; I mean, the pile is wool, that's each — the pile is each little knot tied and it stands up. It's the pile of the rug, so that's why you have all these little pieces of wool standing up.

Q Can you tell us how old this rug is?

A This rug was woven probably in the period 1925 to 1930. It's a very classic design of rug. There's no question about that.

Q And how do you know that's so old, how can you tell?

A Because of the design, the period of time, the colors, the dyes that were used, the type of material; by that I mean, over a period of time when you have studied rugs, you'll see that, for example, the warp strands as time goes on have gotten larger because it takes less work to make some of the newer rugs. This

particular rug, the number of strands in it, in the warp strand itself, is composed of so many pieces of twisted material and you'd find that during that period, this is about what they were using. Now, this could have extended into the early '30s, but generally in the early '30s they had chanaged the overall design in Kashan to a different style. Very similar, but different.

Q Can you tell us what the value of this rug is as it stands now without restoration?

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A This rug as it is right today needs restoration. It's what we call in the trade "thin." However, I would value it to a dealer probably in the neighborhood of three to four thousand dollars, depending on the dealer and how he felt about it. It does need some work to put it in market — what I would call marketable condition.

Q Again, back to Exhibit 2, the picture in front of you, did you do an analysis as to whether the picture, the rug in that picture, is indeed this rug?

A Positively. There's no question in my mind that the photograph here, and I could show you if you'd like me to do that —

Q That was going to be my next question: will you please show us how you know these are the same?

A There are several things that you can tell in a rug. First of all, each rug is made individually. Each rug stands on it's [*sic*] own. You may see another rug

that looks exactly like this rug to you but, believe me, there's a difference. The rug could be made off the same cartoon and there's still a difference. They're made with high hucks and each huck will add some difference to it; for example, if we were to take a knot count of this rug from here to the other end, that knot count would be different. There will not be the same number of knots to each square inch in that rug. It will vary, so we take the average. Now, a rug

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grows old just like all of us grow old. We have — time puts wear and tear on us and a rug of that nature has wear and tear on it. It also has the results of time as far as fading and changing; in other words, dyes change over a period of years. This rug has a very noticeable — the first thing that we notice — when I saw the picture — you can practically see it —

THE WITNESS: Can I pass this to the jury?

THE CLERK: I've got to obliterate something.

A You'll notice when you get a chance to see the picture there's also a distinctive line right through here, about an inch, and on the print you'll see that line and you'll know they're just in the same place and everything. Now, that is what's known as an "arbresh." An arbresh can be caused by a number of things. Some romantic Persians sometimes say it's because of family troubles and another that someone

is having a baby or an aunt died, but this is not necessarily true. This, more than often, is caused by a variation in dye lots. A different lot of wool can make — the same dye used on two types of wool can make a difference, whereas in the beginning it looked exactly the same and over the years one lot has changed at a different rate of fading than the other, and so an arbresh results. You'll find this in many, many old rugs. It's not considered to be a defect, so to speak. It's just something naturally that comes from

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a rug growing old. Now, that's very distinct but I also found in this particular rug some other things about it that were absolutely unquestionable to my mind that this is the rug that's in the photograph.

In the course of wear a rug will begin to show little white spots. These little white spots are caused by the wet threads being tied together to the knotted warp strands being knotted; in other words, you don't have one long continuous piece of string, so to speak, so that little knot which doesn't show at all, you know, to begin with in the rug because it's down here buried down in the bottom of all the pretty wool, but as the years go by the wool wears down and knots begin to show through, and so this rug has, I call them "freckles," but it has quite a lot.

Okay. Now, if you examine — if you were to examine this rug here, you would find that they're as distinct, and I found this in the photograph and I have, as a matter of fact, made an enlargement just so it's easier to see, but there are three spots here and there are two spots right there in a distinctive — I mean, they're close in and that's why I tried to find a spot where there were several. Now, it would be impossible for another rug to have those same five spots in it and you can do the same by analyzing other parts of the rug, but I could find that in the photograph that was in the exhibit and you can readily see them with a

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magnifying glass. I'm sure if the photograph were enlarged, you'd be able to see them. I'll pass this around and you can see —

MR. ELLIOTT: No.

MS. JOHNSON: You object?

MR. ELLIOTT: I object to that unless —

THE COURT: Wait a second.

MR. ELLIOTT: I'll object to it unless the Court permits it.

THE COURT: Yes. Hand it to the Clerk and he'll hand it to the jury.

A The only thing about it is you'll see — be able to see the line through there, the arbresh, when you look through the middle, and then the other arbresh, if you have a magnifying glass, you'll be able to see them

right down here, very distinctly. There are five, three by themselves and two in the tentral [*sic*] or vine.

Q (By Ms. Johnson) I'd like to show you what's been marked State's Exhibit 1 and ask if you can identify this?

A Yes. I took this myself in the other room and it shows the five spots.

MS. JOHNSON: Your Honor, I would offer this at this time.

(The exhibit was handed to counsel for the defendant.)

MR. ELLIOTT: I have no objection to it.

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THE COURT: Be received.

(Plaintiff's Exhibit Number 1 was admitted into evidence.)

MS. JOHNSON: May I also have this passed to the jury?

THE COURT: Yes.

MS. JOHNSON: Thank you. I have no further questions of Mr. Ewaldsen.

CROSS EXAMINATION

BY MR. ELLIOTT:

Q Mr. Ewaldsen, we admit your expertise in this field. Are you in any way biased towards Mr. Aryeh in this case?

A Absolutely not, sir.

Q Do you do business with Mr. Aryeh?

A I've done business with Mr. Aryeh for probably seven years, I think. I've bought rugs for Mr. Aryeh and I've sold rugs to Mr. Aryeh in travels throughout the United States as many of us do.

Q How does it come you're up here testifying?

A I was called by the district attorney's office a few days ago and asked if I would like to or had time to come up as an expert witness.

Q Pay your bills up here?

A I believe they are, yes. They've paid my airfare so far.

Q All right, but in fact you're a business associate of

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Aryeh, are you not?

A No, I'm not, no more than I am with any other — as I say, I simply buy and sell. I'm not associated in any way.

Q Mr. Ewaldsen, I didn't ask that. I asked you whether you were a business associate of Benjamin Aryeh?

A No.

Q When did you last sell a rug to him?

A Probably last summer some time.

Q Have you bought any rugs from him lately?

A Yes.

Q When?

A Well, I just — I just sold — I had a few of his rugs on consignment that I just sold.

Q So you had them on consignment from him and you sold them for him, right?

A Yes.

Q Did you pay him for that?

A Yes.

Q So although you're not a business associate, you were doing business with him as recently as two or three weeks ago, weren't you?

A That's true.

Q Now, then, I asked you whether you were biased in this and you said you weren't, right?

A Right.

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Q Mr. Ewaldsen, did you not file or try to file a complaint with the district attorney's office in Medford, Oregon, against Mr. Kennedy a number of years ago because he was a competitor of yours down there?

A No, I did not. Against Mr. Kennedy?

Q Did you file against Mr. or Mrs. Kennedy or their business venture down there?

A No, I did not file. I caused an inquiry to be started.

Q Well, did you file a complaint with the district attorney's office down there in which you charged them with fraudulent advertising?

A I believe we did. It's been a long time ago.

(Counsel approached the witness.)

Q Is that your handwriting?

A Yes, and it's my signature and since you've introduced this, I would like an opportunity to explain it.

Q Well, you —

A In other words, the whole document —

THE COURT: Just a minute. He'll handle the questions, you handle the answers.

Q (By Mr. Elliott) Mr. Ewaldsen, after you went to the district attorney's office and filed this complaint against Mr. and Mrs. Kennedy or their business, nothing came of it, did it?

A No. I never met Mr. Kennedy. I didn't know — I mean,

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I never met him.

Q I didn't ask you whether you met him, Mr. Ewaldsen. I asked whether or not anything came of your complaint filed with the district attorney's office down there?

A The district attorney did not pursue it.

Q Thank you. * * *

[Cross-examination concerning witness's expertise omitted in printing]

* * * * *

[February 28, 1980]

* * * * *

[Further cross-examination and redirect examination concerning witness's expertise omitted in printing]

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* * * * *

MS. JOHNSON: Now, I would ask that the paper that counsel was waving around yesterday be marked as an exhibit, the paper, something about a claim, a consumer complaint, out of Medford in 1972. Counsel produced a paper yesterday and was questioning Mr. Ewaldsen. It should be properly marked as an exhibit, if it is going to be any part of this trial. I would ask that they produce it at this time.

MR. ELLIOTT: Are you asking me to produce it?

MS. JOHNSON: That's right.

MR. ELLIOTT: Great. Excuse me, Karon, I put it in a — here we are. I believe I gave you these three sheets.

MS. JOHNSON: Thank you.

Q (By Ms. Johnson) Mr. Ewaldsen, in 1972, did you know Bruce Kennedy?

A No. I've never met Mr. Kennedy.

Q Even today?

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A Then or today. As of this moment, I have never formally met the man.

Q In 1972, did you file a consumer complaint against one of the Kennedys?

A We filed a complaint against the firm that was displaying rugs at the Red Lion Motel and ran some ads in the paper and I believe the firm was owned by Mrs. Kennedy.

Q I would like to show you what's been marked State's Exhibit 11. It's only a copy. Will you tell us if that is a copy of the consumer complaint that you filed?

(The document was handed to the witness.)

A It looks to me like a copy. It has my signature and it is.

MS. JOHNSON: Your Honor, I would offer Exhibit 11 at this time.

MR. ELLIOTT: No objection.

THE COURT: Be received.

(Plaintiff's Exhibit Number 11 was admitted into evidence.)

(By Ms. Johnson) Why did you do that, Mr. Ewaldsen?

A Well, at the time when the ads were run in the newspaper, we felt they were misleading in that they made certain statements that —

MR. ELLIOTT: Just a moment. I'll object to that as hearsay, unless he can produce the advertising or authenticate —

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THE COURT: I think we're getting way off —

MS. JOHNSON: The Court promised yesterday he could explain what he tried to explain yesterday, why he filed this complaint and Mr. Elliott cut him off and the Court said you would let me go into this matter on redirect, and that's what I'm trying to do. Now, it goes to allegedly a bias against the Kennedys, and I think he's entitled to explain why he did what he did.

THE COURT: Yes, he is, but if he's going to begin quoting something that is not in evidence of what someone else said, a third party, at that time we're getting way off on hearsay, how he — general impression, but without attempting to offer something that's not in evidence and would be what some third party stated.

Q (By Ms. Johnson) Did you read an ad in the newspaper about another dealer's show down there?

MR. ELLIOTT: I'll object to this. She's calling for a conclusion of the witness. How does he know what other people —

MS. JOHNSON: Did he read an ad in the newspaper. That was my question.

MR. ELLIOTT: I don't object to that question.

THE COURT: All right.

A Yes, I did.

Q (By Ms. Johnson) And where was this show? Did you go

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to the show?

A I did not personally go to the show because I was not available to go to the show.

Q Did you have — excuse me. Did you have personal knowledge of the rugs that were being — the source of rugs that were being shown at that show?

A Yes. The rugs came from the Kennedy — Mrs. Kennedy was there with them.

Q And did you know from your own personal knowledge where she had gotten those rugs?

A I don't know exactly where she got them. She undoubtedly got them —

MR. ELLIOTT: Just a moment. I'll object to that.

THE COURT: You're surmising. All right. Unless you personally know.

Q (By Ms. Johnson) She alleged that they had been personally brought from Iran by her?

A She had said that to a number of people that came that she had went —

MR. ELLIOTT: I object to that.

THE COURT: That will be stricken. That's pure hearsay.

Q (By Ms. Johnson) Did you know the advertisement to be false?

MR. ELLIOTT: I didn't hear that question.

Q (By Ms. Johnson) Did you know the advertisement to be

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false?

A We believed it to be false.

MR. ELLIOTT: I object to that. He's not being responsive to the lawyer's questions.

THE COURT: The question is did you believe the advertisement to be false.

MR. ELLIOTT: Well, she said: did you know it to be false.

Q (By Ms. Johnson) Did you believe it to be false?

A We believed it to be false, the part that certainly had misleading statements.

THE COURT: That will be stricken.

MR. ELLIOTT: I'm going to ask that this witness' testimony be stricken in this particular line entirely. He keeps volunteering and he's infecting the testimony with innuendo. I would ask that it be entirely stricken and the jury asked to disregard it.

THE COURT: The last part I'll ask the jury to disregard, his beliefs and so on. All right. Go ahead.

Q (By Ms. Johnson) Were your concerns about the truth of that advertising the sole reason you filed this complaint?

A That's the sole reason. In those days, the county district attorney's office in the various counties had just started the consumer protection —

MR. ELLIOTT: I'll object —

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THE COURT: It will be stricken.

MR. ELLIOTT: — to the answer.

THE COURT: Just don't volunteer. Just answer the questions.

Q (By Ms. Johnson) And was your complaint in the nature of a consumer protection complaint?

A Pardon?

Q Was your complaint in the nature of a consumer protection complaint?

A Yes.

Q Did it involve any business dealings with the Kennedys that you personally were having?

A No. I have never had a business dealing with the Kennedy firm.

Q Now, have you dealt on a business basis with Aryeh?

A Yes, I have.

Q What is the nature of your business dealings with him?

A Ordinary commercial transactions of the type done in the oriental rug business all the time.

Q With how many other dealers do you do the same kinds of transactions?

MR. ELLIOTT: I'll object. It's completely irrelevant.

THE COURT: Well, I think the amount involved would be relevant. All right. You may answer.

Q (By Ms. Johnson) How many other dealers would you deal

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with on the same basis?

A A great many. We have — there's a common practice, they come through all the time looking for old rugs, so we sell rugs to them, we buy rugs for them, we have clients for rugs that they may have.

Q Have you ever done business with the Kennedys?

A No, I have not.

Q Is that because he is a crook?

MR. ELLIOTT: Your Honor, I have a matter for the Court. I would ask that the jury be excused.

THE COURT: We'll have a brief recess.

(The jury left the courtroom at 10:31 a.m.)

THE COURT: Would you, Mr. Petersen, would you read that last question.

(The question appearing on line 8 was read by the court reporter.)

MS. JOHNSON: I asked the question and he answered it. Mr. Elliott is the one who brought all this up. He asked the witness whether he was biased against the Kennedys because he did business with Mr. Aryeh and never even asked him in fact whether he did business with the Kennedys and why. I think the jury is entitled to know because it's in evidence that he does business with Aryeh and all kinds of

other rugs dealers and yet he does not do business with Mr. Kennedy. This directly goes to the business that Mr. Elliott brought up in

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the first place. I think the jury is entitled to know why Mr. Ewaldsen does not do business with the Kennedys.

THE COURT: I think that — go ahead.

MR. ELLIOTT: Your Honor, this witness has said under oath and on this stand that he has done no business with Mr. Kennedy. We have 12 jurors here. We're dealing with the facts. The defendant in this case is indicted on the charge of theft which is a moral offense. Counsel has deliberately placed in the mouth of this witness an opportunity to assert that the defendant in this case is a crook and on that ground that this jury cannot, after that expression by the deputy district attorney, cannot hear and truly try without prejudice against this defendant and the charges that he faces in this court. He is charged with being a crook. This man, if he had said, "I had dealings over the years with this fellow," the question then would not be appropriate but it would have at least been in better taste than it is now, and I move that there be a mistrial and this case reset for trial and this jury discharged, and I have never made a motion on which I felt more serious.

THE COURT: Granted.

MS. JOHNSON: Do I understand this case will be set in the normal course?

MR. ELLIOTT: It will be set when I'm ready to try it.

MS. JOHNSON: Your Honor —

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THE COURT: Did you want to make something more for the record?

MR. ELLIOTT: She wants to argue for the record.

THE COURT: I've already made my decision.

Mr. ELLIOTT: All right. Thank you.

MS. JOHNSON: Your Honor, I don't understand the basis for the Court's ruling.

MR. ELLIOTT: She's arguing. The Court already made a ruling in the case.

MS. JOHNSON: That's why I asked the Court —

THE COURT: I think it's totally out of line, your question of saying — it got right to the heart of it. You asked the question. If he had blurted it out without a question on your part, it would be something else possibly.

MS. JOHNSON: Your Honor, why is this not relevant?

THE COURT: Your question saying, "The reason I won't" — "The reason you wouldn't do business with him is because he's a crook?" That was your question, wasn't it?

MS. JOHNSON: That's right, because Mr. Elliott brought all this up. He attacked — Mr. Elliott is the one who said, "Aren't you biased against the defendant?" He's the one who said, "Well, you do business with Aryeh, don't you, and you're a business associate of his, aren't you?" I never brought up any dealings that Mr. Ewaldsen had with either of these parties other than on my direct examination I asked him

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to make an identification on the rug. It's Mr. Elliott who brought up all that and once having done so and having called this man's business into question by the business dealings that he did with Eastern parties, if any, I think he's entitled to explain, and it's not improper in any way to ask who he deals with and why and —

MR. ELLIOTT: If counsel —

MS. JOHNSON: I'm not finished.

MR. ELLIOTT: If counsel is not content with the ruling, she should file an appeal on the case. I would ask to be excused from this argument. The Court has already ruled on this matter.

MS. JOHNSON: May I finish?

THE COURT: I'll permit her to finish.

MS. JOHNSON: I don't understand why, in view of his questions, and that's the only reason it was asked, in view of his questions, Mr. Elliott's questions, why is it improper to allow the witness to answer that ques-

tion? As I said, I didn't bring this up in my case in chief. It was Mr. Elliott.

THE COURT: Well, but I think your question is — in an effort to rehabilitate him, you certainly are entitled to get some of that in but I think your question went beyond that. Your question, I feel, Miss Johnson, was highly prejudicial; got right to the heart of it and that it was just uncalled for. I think you went one line beyond, and what you're

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telling the jury by your question is just exactly what the issue is right here, that he pulled a fast deal. It's relevant to the guy's business he's engaged so I think the effect of that is to put in the jury's mind that the man's a crook and therefore he must have done this whether he's guilty of the charge or not.

MS. JOHNSON: Is it the Court's position, then, I could have asked: "Why did you not do business with Mr. Kennedy," because that's what the answer would have been —

THE COURT: Well, that would have been —

MS. JOHNSON: -- and we're back right where we were.

THE COURT: You went one step beyond.

MS. JOHNSON: Before the jury comes back, I would ask to withdraw that question and go the route that the Court suggests and let me ask Mr. Ewaldsen:

"Why do you not do business with the Kennedys"? Now, the Court has held that would be a proper question. Is that all right, because it's going to be exactly the same and we'll be right where we are now but —

THE COURT: I feel that that was prejudicial. Now, if Mr. Elliott wants to withdraw his motion, we would continue, but in absence of that, the Court feels that you have gone beyond —

MR. ELLIOTT: Thank you, Your Honor. I repeat my motion. All right. Thank you.

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(There was a discussion relative to withdrawing the exhibits and they were withdrawn.)

(Court adjourned at 10:40 a.m.)

ORDER ALLOWING MOTION FOR MISTRIAL

[Filed March 5, 1980]

[Caption omitted in printing]

On February 27, 1980, this matter came before the court for trial of the above defendant on the charge of THEFT IN THE FIRST DEGREE, before the Honorable Phillip J. Roth, plaintiff appearing by Karon V. Johnson, Deputy District Attorney, and defendant appearing with his attorney, Charles V. Elliott.

A jury was duly empaneled and sworn, and during the presentation of the State's case, defense counsel moved for a mistrial, and the court having fully considered said motion and being fully advised in the premises,

IT IS ORDERED that defendant's motion for the declaration of a mistrial is hereby allowed and a mistrial is declared.

IT IS FURTHER ORDERED that the jury be discharged from further consideration of this case, and that the State's exhibits entered in evidence be released to the Office of the District Attorney.

IT IS FURTHER ORDERED that the within case be continued for trial to a later date yet to be determined.

Stenographic notes of this proceeding were made by the official court reporter, Bob Petersen.

/s/ Phillip J. Roth
PHILLIP J. ROTH, Judge

DEFENDANT'S MOTION TO DISMISS

[Dated March 17, 1980; filed March 19, 1980]
[Caption omitted in printing]

Defendant moves for an Order of Dismissal of the Indictment on the ground that Defendant was previously required by the State to stand trial on this charge on the days of 27 and 28 February 1980.

A jury was empaneled, sworn; and three witnesses were called by the State, and each testified against the Defendant.

On re-direct examination of the third State's witness, the prosecutor, in presence of the jury, asked a leading question of the witness which was intended to brand the defendant in explicit terms to be "a crook".

Defendant moved for a mistrial which was summarily granted by the trial Judge, Hon. Phillip J. Roth.

Under State and Federal case law, to try Defendant a second time on this charge shall violate federal and state constitutional provisions.

[Points and authorities, signature, and attached portions of transcript omitted in printing]

HEARING ON MOTION TO DISMISS

[Caption omitted in printing]

[March 17, 1980]

[2]

THE COURT: In the matter of State of Oregon vs. Kennedy, there has been filed now a Motion for Dismissal, which we will dispose of at this time. This being the defendant's motion, you may proceed.

MR. ELLIOTT: Thank you, Judge Murchison. Your Honor, the motion handed to the Deputy District Attorney and to the Court is a recitation of the incident which occurred during a prior trial of this Indictment. The defendant was in Court under the Indictment on the 27th and 28th days of February last month.

As the Motion states — and I am talking principally for the record — the jury was empaneled, sworn, and three witnesses were called by the State, and each testified against this defendant. When the third witness was called — his name is Otto Ewaldson [*sic*, throughout] — he was under direct examination by the Deputy District Attorney for some time and was then cross-examined by Counsel for the defendant. During the cross-examination of Mr. Ewaldson and in part of the direct examination, he asserted that certain things existed — and I invite the Court's attention to the fact that the next remarks by the witness taken directly from the transcript of the trial are all

part and parcel of the stage setting which resulted eventually

[3]

in an improper question asked by the State and which we charge as a statement that is, in substance, prosecutorial overreaching or misconduct.

The questions that set the stage for the final interrogation of the witness, in effect, establish the fact that this witness, Mr. Ewaldson, did not know Mr. Kennedy. He did not know Mr. Kennedy, nor was he in any way involved in business dealings with the Kennedys.

In other words, the Kennedys were strangers to him. It was after this had been established that the State asked a question which resulted in a motion for a mistrial. For the record and for Your Honor's enlightenment, I am reading from page 66 of the transcript, and the important parts of it have to do with questions intended by the defendant to impeach the witness. He has previously asserted that he had no bias nor prejudice against the defendant, and he was then asked whether he had filed a complaint with the District Attorney's office against the defendant, his wife or the defendant's company, and he said, "Yes;" that he had filed such a complaint.

This, despite his earlier assertion that he was not biased — he stated that his complaint was in the nature of a consumer protection complaint.

Then, I asked him, "Did it involve any business dealings with the Kennedys that you personally were having?"

[4]

And his truthful answer was, "No. I have never had a business dealing with the Kennedy firm."

"QUESTION: Now, have you dealt on a business basis with Aryeh?" Aryeh was a gentleman who is, in effect, the principal witness for the State.

He answered to that : "Yes, I have."

That, again, asserts the circumstance of bias because he has, in effect, taken the witness down to testify on behalf of the State's principal complainant, Mr. Aryeh. He said that he had dealt with him on a business basis.

I then asked him, "What is the nature of your business dealings?" Then, he said, "Ordinary commercial transactions of the type done in the Oriental rug business all the time," establishing a community of interest between this witness and Aryeh, the complainant.

"QUESTION: How many other dealers do you do the same kinds of transactions — with how many other dealers do you do the same kind of transactions?" These are all questions by the State. I have misspoke myself when I said I asked those questions. They were asked by Ms. Johnson, the Deputy District

Attorney. Then, I objected, saying that it was irrelevant, and the Judge overruled that objection and told him to answer.

Then, Ms. Johnson said, "How many other dealers would you deal with on the same basis?" He answered, "A

[5]

great many. We have — there is a common practice. They come through all the time looking for old rugs. So, we sell rugs to them. We buy rugs for them. We have clients for rugs that they may have."

Then, she asks again: "Have you ever done business with the Kennedys?" Then, this is a most important question. He says, "No, I have not." She said, "Is that because he is a crook?"

Immediately, I asked that the jury be excused. The Court excused the jury, asked the reporter to read the question, and Ms. Johnson then proceeded to state her views on this matter, and there was an — an exchange of argument between Ms. Johnson and the Court and defense counsel, and the Court, in one word, simply said, "Granted." So, my motion for a mistrial at that time was immediately granted.

Subsequently, Mrs. Johnson availed herself of an opportunity to be heard on the motion, despite the fact that the Judge had ruled, and I have no criticism of Mrs. Johnson for that. The Judge, as is stated in our

motion, told Mrs. Johnson — and it is patent in the transcript — that she had overstepped the line and had gone beyond reasonableness. If the Court was adjourned and we left to await any further proceedings, that might be had. Now, the law which is the principal interest to

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this Court is patently clear. I won't read the Constitutional provision. This Court has long been on the bench and well understands that the Federal and State Constitutions established the rule that one may not be twice put in jeopardy for the same offense. The Fourteenth Amendment is binding upon the State to the effect that such — that the State must pass no law to invade the rights of this defendant in any measure at all.

The principal cases are set forth in the Defendant's Memorandum, and, for the record, I ask the Court's forbearance in quoting from 8 — *United States vs. Jorn,* [400 U.S. 470], which is a 1971 case, which, in ffect, asserts the proposition that the State should not be permitted to make repeated attempts to convict an individual for the same offense; thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. That's a hard line rule from the *Jorn* case. There is an assertion in a 1949 Federal case, *Wade v. Hunter,* [336 U.S. 684], quoted in our Motion, which

asserts the proposition that the defendant has a valued right to have his trial completed by a particular tribunal, once the trial has been commenced.

Now, we're aware of the proposition that if it is the act of the defendant that interrupts the trial with a motion that the trial be aborted, the defendant cannot under

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ordinary circumstances be heard on a plea of double jeopardy if he is again brought in for trial. However, there is one point and remarkable exception to that rule that the State in a case that was decided in 1976 in the Fifth Circuit, [*United Staes v. Kessler,* 530 F.2d 1246], a rehearing was denied in this case, and that states the rule that it is the — that the present law, Your Honor, where prosecutorial overreaching occurs so that defendant's mistrial request does not remove constitutional double jeopardy barrier to retrial, the government must have through gross negligence or intentional misconduct caused aggravated circumstances to develop which seriously prejudiced the defendant, causing him to reasonably conclude that tainted proceedings would result in conviction.

Now, Your Honor, at the time that the question was asked — and I refer to the question, "You didn't do business with him, although you didn't know him, you didn't do business with him because he's a crook?" —

in the first place, that is a leading question. It is improper on direct examination — entirely improper. The answer is suggested by the question itself.

When that question was asked, this case had gone very well for the defendant. At that point, we were entitled to go ahead with that trial, but the use of this question before a jury of twelve people. So, in effect, all of the evidence that we were faced with — we could either live

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with the improper question of the Deputy District Attorney, identifying the defendant in the case as a crook, or we had to move for a mistrial. We elected quickly to move for a mistrial, and we invited Your Honor's attention to the fact that the Judge did not long ponder this. The Judge immediately, Judge Roth, who has been on the bench for years, immediately declared a mistrial.

There is an Oregon case, *State v. Jackson,* [33 Or. App. 139, 575 P.2d 1001], decided in the Court of Appeals in 1978, where circumstances leading up to mistrial reveal the prosecution's conduct as being intentional, overreaching or in bad faith, reprosecution is improper. This statement by the State will fall into any of those categories. We could, as defendants, not be spent [*sic*] in any way to come back in and be tried in another Court, nor could we proceed with this trial

in view of the — the gravely improper question proposed by the State.

We claim that this was intentional. It is certainly overreaching. If it wasn't any of those, it was certainly bad faith, and we're bou..d by *State v. Jackson,* which is a case that was decided the year before last. It has not been overruled.

The Judge then, in concluding the trial, said, "I think it is totally out of line. Your question or saying" — then, he says, "It got right to the heart of it." This man was brought in, charged under a moral issue. He's

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charged with an Indictment for Theft I, and at that point in time, there was an attempt by the State to declare before the jury had all of the evidence the proposition that this man was a crook. At that point, Your Honor, the transcript is clear — there was no evidence that he was a crook. So, it was either a hip shot or grossly negligent.

The Judge then said, "You asked the question, and remember this assertion that this defendant was a crook did not come from the mouth of Otto Ewaldson, the witness. It came out of the mouth of the Deputy District Attorney."

We ask that this Indictment be dismissed and this man sent back to his business.

MS. JOHNSON: Your Honor, I think — I have never had one of these motions, but I think, although

appropriate procedure is for me to take the stand — I would ask to be sworn at this time.

[10]

KARON V. JOHNSON,

was thereupon called as a witness in behalf of the State, and, having been first duly sworn, testified as follows:

THE CLERK: Your full name, please.

THE WITNESS: Karon; K-a-r-o-n; Johnson; J-o-h-n-s-o-n. It's not Mrs. Johnson; alas, I'm divorced. It is Ms. Johnson.

MR. ELLIOTT: Your Honor, I have respect for the legal abilities of the prosecutor and before she testifies, I would request that the Court establish for the record the procedural question here, whether she has a right to take the stand under oath and to testify about this — this record speaks for itself. I have had double jeopardy motions before, and they have been heard on argument of counsel for both sides, and the Court has made its decision here and in the State of California. I don't know of anything in our procedural rules that permits a witness — a lawyer for either side to get up on the witness stand and testify unless this is a procedure that Your Honor approves, and I object to it.

THE COURT: The normal procedure in handling these motions, is to do it by a means of

argument, and the Court generally accepts the statements of Counsel as representatives of an officer of the Court.

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However, I know of no rule which would prohibit either party from calling a sworn witness to testify about reference to the substance of a motion if they wish to do so. In this case, the District Attorney has indicated that she wishes to call herself as a witness and if she wishes to proceed in that fashion, I would approve the procedure. So, you may proceed.

MS. JOHNSON: Your Honor, I wish to testify that my — that my question in no way constitutes an intentional move for a mistrial. I want to put that on the record why I asked that question. The evening terminated when we were still in the cross-examination of Mr. Ewaldson. Counsel has sought to impeach Mr. Ewaldson, as I understand it, by implying he had a bias in favor of the victim in this case.

The case involves a theft of a Persian rug; that he had a bias in favor of the witness because he had done business dealings with the victim, Mr. Benjamin Aryeh. I noticed in listening to the cross-examination that he never asked my expert whether or not he had any dealings with Mr. Kennedy. So, after we recessed for the evening, I talked

to Mr. Ewaldson out in the hall, and I asked him, "Do you have or have you done any business dealings with the Kennedys?" And his answer was, "No."

[12]

MR. ELLIOTT: I will object to that. That is absolutely nothing but hearsay. If she has knowledge within herself to testify under oath, she shall do it, but I object to her getting up there and bringing in some third-party statements.

THE COURT: Objection overruled. That — the substance of that is already in the transcript which you have furnished to the Court. So, you may proceed.

MS. JOHNSON: And I asked Mr. Ewaldson, "Why don't you do business with the Kennedys?" And his answer was more nicely phrased than my question the next day. His answer was something to the effect that Mr. Kennedy did not meet the standards of professional conduct that he expected in the people that he did business with. And I asked Mr. Ewaldson at that point, "You mean you don't think he's honest or honest in his business dealings?" And Mr. Ewaldson indicated that he did not think he was. At that point, I thought, well, Mr. Elliott brought all this up. I think I'm entitled to ask Mr. Ewaldson if he does business with the Kennedys, and why not? That was the reason that I

asked the question the next day because I thought it was relevant, and I had no intention to cause a mistrial in any way, and I indeed objected to it. That's what I wanted to supplement

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the record with.

THE COURT: Very well. Do you wish to cross-examine?

MR. ELLIOTT: Yes, I do, Your Honor.

CROSS-EXAMINATION

BY MR. ELLIOTT:

Q You say that your question that you asked was not intentional, Ms. Johnson?

A No. I say I did not intend to cause a mistrial.

Q You practiced law for some time; have you not?

A Three years.

Q All right. Do you understand that either counsel calling a witness on direct examination is denied the right to ask leading questions?

A As a general rule.

Q Well, What is the — what is the exception?

A The exception is if the witness is hostile.

Q Was your witness hostile?

A No. No, I don't dispute it. I should not have asked a leading question. I don't dispute that.

Q So, you admit that question was leading; was it not?

A Yes, it was leading.

Q And the answer to the question was suggested by the question itself; was it not? That's why it was leading? And the answer that you solicited was that this man would affirm

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your statement that Mr. Kennedy was a crook; isn't that what you intended?

A And, indeed, he would have.

Q Then, it was intentional; was it not?

A The question was intentional. I'm testifying that I did not intend to cause a mistrial in the case. That was the farthest thing from my mind. That's my testimony.

Q Ms. Johnson, you understand that in order for double jeopardy to attach, it isn't required by the decisions, is it, that the person asking the question must intend that he establish grounds for a mistrial? That isn't a factor; is it?

A On the contrary, it goes right to the heart of the thing.

Q No. You are not answering my questions.

A I disagree with you.

Q It isn't necessary that the question be intended to cause a mistrial? It can be an improper question and still not be intended to cause a mistrial; right?

A No.

Q Now, then, when you went out in the hall, you obtained information which resulted in your questioning of Mr. Ewaldson on your direct examination?

A On my redirect.

Q Excuse me. On your redirect examination, and those

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questions were to establish the fact of whether or not he knew Mr. Kennedy at all; right?

A No.

Q Well, will you — you asked it in the transcript. Do you deny that?

A I thought that he did not personally know Mr. Kennedy.

Q All right. You knew that he didn't know Kennedy?

A Right.

Q If you still — but you still invited him to call Kennedy a crook, although you knew he did not know Kennedy?

A He didn't — he told me that he had —

Q Answer that question.

A I can't the way you phrase it. He told me he had no business dealings with the Kennedys and the reason he did not. I didn't understand that to mean that because a man doesn't personally know someone by face, it doesn't mean that they don't have business

dealings with them. You can correspond with someone all over the country.

Q Ms. Johnson, let me ask you this: You established by your redirect examination that he didn't have business dealings with him; didn't you?

A That's right.

Q And that he didn't know Mr. Kennedy? Do you want me to read it from the transcript?

A Well, I can't remember what he said. I know that he

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did not personally know Mr. Kennedy. He knew of Mr. Kennedy and, indeed, the Kennedys — he had filed a consumer complaint against Mrs. Kennedy for fraudulent advertising down in Medford in '72. So, I knew he knew of the Kennedys. He knew of the Persian Rug Gallery. He did not personally deal with them because of their professional standards, and that's what I was trying to elicit.

Q I'm reading from page 66 of the transcript, and this is a copy of the testimony in the case that was prepared by —

A Bob Petersen.

Q Who is the reporter for Judge Roth. You can talk about the nature of a consumer protection complaint, and I don't want any innuendo that that complaint was valid, because later it was dropped; was it not?

A I don't know.

Q All right. Well, that will come out in the trial if there is one. "Was your complaint in the nature of a consumer protection complaint?" Now, this is a question you asked of your own witness.

A That sounds familiar.

Q He said, "Yes." Then, on page 66, the next question: "Did it involve any business dealings with the Kennedys that you personally were having?" His answer was, "No." Then he embellished his answer and said, "I have never had a business dealing with the Kennedy firm."

[17]

A Yes.

Q Okay. All right. Then, on page 67, you are back with another question which really set up the question we consider, Ms. Johnson, to be improper: "Have you ever done business with the Kennedys?" He came back again and said, "No, I have not." Then, you said, "Is that because he is a crook?" That is your leading question, the one to which we objected?

A Right.

Q Now, you have testified for us that you went out in the corridor and you talked to Mr. Ewaldson?

A Uh-hum (affirmative).

Q And you said he answered that he did not meet Mr. Kennedy, the defendant — this is your answer verbatim just now, he does not meet the standards of

professional conduct that he, meaning Mr. Ewaldson, expected. Now, did you ask him what those standards were?

A No.

Q You didn't interrogate him on the witness stand about, first, what standards he recognized as important; did you?

A No.

Q You simply assigned an identity to this man as a crook, and he's a defendant in a courtroom?

A I know why — I know why I didn't ask him because I — do you want to know why I didn't ask him about his professional

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standards?

Q No.

A I didn't think so.

Q Isn't it fair to say that it's your duty and mine in a courtroom and, particularly, the duty of a prosecutor, which I have been and Judge Murchison has been — it's our duty to protect the defendant from improper innuendos as well as it is to bring every reasonable fact of evidence to the jury in an effort to convict him?

A I have an ethical duty not to do anything that is improper. That is true.

MR. ELLIOTT: That's all the questions I have of this witness.

MS. JOHNSON: May I explain the answer?

THE COURT: You may.

MS. JOHNSON: Mr. Elliott asked why I did not go into more detail on what Mr. Ewaldson meant by professional standards. By then, I talked to enough people. I had enough ideas about the way the Kennedys did business and about the methods that they used and some of the things Mr. Ewaldson had personally been in contact with that I didn't feel it was necessary to go into it any further. I thought I understood what he meant.

MR. ELLIOTT: She's testifying and — she isn't

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testifying about this motion at all.

MS. JOHNSON: I have nothing further.

THE COURT: Well, it's an explanation to the question you asked. If that concludes the record, you may step down.

Any argument — further argument?

MR. ELLIOTT: No, not for the defendant.

MS. JOHNSON: The defense has correctly stated the law as set out in Oregon under *State v. Jackson*; that if the defendant moves for a mistrial, it is particularly deemed to be waived unless the mistrial has been caused by the intentional misconduct, bad faith or overreaching by the State. This *Jackson* case is a — corollary of the U. S. opinion which is in the same vein, *U. S. v. Dinitz*, [424 U.S. 600]. It is a 1975 [*sic*] case, and it pretty well sets out the problems. There is

no evidence that the State intended to cause a mistrial. The defendant moved for it. The State vigorously objected. Judge Roth left the bench immediately. I went into chambers to pull him out and asked him to take the bench so that I could change his mind.

If the Court looks through the transcript, you will see that Judge Roth, who sat on the case, made no finding that the mistrial had been caused by intentional misconduct or by bad faith or overreaching by the

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State. No such findings were made by the trial court and, in fact, I had asked the Court whether it was the substance or the form of my question that was improper, and the Court seemed to indicate that it was not the substance of the question. It was the form that was improper, and, indeed, I don't dispute it. I should not have phrased it the way I did.

It is the State's position that a mistrial should not have been declared in the first place. I ask leave of the Court to reask my question to simply ask Mr. Ewaldson, "Why don't you do business in the Persian Rug Gallery?" Nevertheless, the Court granted a mistrial, but there is no findings to support the motion in this case that it was done intentionally.

MR. ELLIOTT: Your Honor, I want to be heard on that. In the first place, it isn't the province of that Court at that time on the motion to make any findings

like that. The Judge immediately said, "Granted." One word. I invite the Court's attention to the following: She has admitted that it is overreaching because she did not discuss with her witness, Ewaldson, the fact that the defendant was a crook. She said he made a statement that Mr. Kennedy did not meet the standards of professional conduct that the witness expected. What would be wrong with the question, Your

[21]

Honor, if she said, "Do you have an opinion whether or not Mr. Kennedy meets the standards of conduct in this particular business that you would expect?" What's wrong with that question? And his answer would have said, "Yes, I have an opinion." Then, she would ask him what it is. He puts — she put him on the witness stand as an expert, and we concede that he is an expert, but this investigation by Ms. Johnson as to this man's reason and his response to her — it is an admission on the State's part that he said he doesn't meet the standards of professional conduct. Your Honor, does that vest the State with the right to come in and challenge this man through a witness that he is a crook and the use of the term "crook"? Had she gone out and talked to Mr. Ewaldson and he said that this guy is a crook, and I will tell you why — he didn't say that. But, she contrived when she asked the question to paint this man with that brush, and the form of that question

does not excuse the use of the word "crook". She simply overstepped the bounds, and we submit that this case is not — not worthy of retrial, and the Indictment here should be dismissed. This man is put to thousands of dollars that he has spent. He has been harrassed. [*sic*] We will have testimony if the case goes to trial of this

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harrassment [*sic*] this man has faced since the first trial and this — the harrassment [*sic*] in the business, and it is — I have never in my life made a motion about which I am more sincere before this Court or any other Court in which I have practiced law.

If there is a case for double jeopardy or form of jeopardy, as the case may be, this is it, and we cannot — Your Honor must be willing to excuse this conduct by the State if you deny this motion.

THE COURT: Well, Counsel, I assume that Counsel appearing before the Court are always sincere in their motions. The issue before the Court is whether or not the conduct in this matter was intentional, overreaching or in bad faith, and as the Court has reviewed the portion of the transcript which you have attached to your motion and has listened to your explanation of the circumstances of how this matter arose, it seems apparent that the objectional statement was made in the course of an attempt to clarify matters which had been brought out on cross-

examination, and this, of course, is a proper function of redirect examination.

I have reviewed the transcript and the wording, as put, and I would agree that the question was improper as put. I do not find, however, that it constitutes

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bad faith or was intentional impropriety. The question of whether or not it constitutes overreaching is one of those gray areas where we have to determine what "overreaching" means, and in looking to the case which the defense has cited, *United States v. Kessler,* prosecutorial overreaching is there defined as being such as must have been a result of gross negligence or intentional misconduct which prejudiced the defendant so that he cannot receive a fair trial, and I wouldn't find that the overreaching or the erroneous conduct in this matter reaches that degree of aggravation. I don't think it amounted to gross negligence or intentional misconduct.

The Motion for Mistrial will be denied. The Motion for Dismissal of the Indictment will be denied, and we will proceed to trial.

* * * * *

OPINION OF OREGON COURT OF APPEALS

[Opinion set forth in full as Appendix A, pages 12-16 of the printed petition for certiorari]

ORDER OF OREGON SUPREME COURT DENYING REVIEW

[Order set forth in full as Appendix B, page 17 of the printed petition for certiorari]

JUDGMENT AND MANDATE OF OREGON COURT OF APPEALS

STATE OF OREGON
COURT OF APPEALS

STATE OF OREGON, Respondent,	)	JUDGMENT and MANDATE
	)	Appeal from
v.	)	MULTNOMAH County
	)	Circuit Court
BRUCE ALAN KENNEDY, Appellant.	)	No. C79-12-34399
	)	CA 17729

This cause having come on to be heard on appeal and having been duly submitted and considered, and petition for review having been denied by the Supreme Court on March 4, 1981,

IT IS HEREBY ADJUDGED and ORDERED that the decision entered below in this cause is reversed.

The cause is returned below for entry of judgment pursuant to law and the opinion and order of the court entered November 24, 1980.

IT IS FURTHER ORDERED tha appellant recover from respondent costs and disbursements in this court taxed at $75, to be paid in the first instance by Multnomah County.

ISSUED at Salem, Oregon: MAR 16 1981

[Verification omitted in printing]